No. 919

In the Supreme Court of the United States

October Term, 1950

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PETITIONERS

AND

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.

v.

GEORGE P. DAVIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2, 3, 4
Specification of errors to be urged	4
Reason for granting the writ	4, 5, 6

CITATIONS

Cases:	
Chas. C. Steward Machine Co. v. *Davis*, No. 837, October Term, 1936	4
Norman v. *Consolidated Edison Co. of New York*, decided April 12, 1937 (C. C. A. 2d)	5
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429	6
Statute:	
Social Security Act of August 14, 1935, c. 531, 49 Stat. 620:	
Sec. 201 (U. S. C., Sup. II, Title 42, Sec. 401)	14–15
Sec. 202 (U. S. C., Sup. II, Title 42, Sec. 402)	16–17
Sec. 203 (U. S. C., Sup., II, Title 42, Sec. 403)	17–18
Sec. 204 (U. S. C., Sup. II, Title 42, Sec. 404)	18
Sec. 205 (U. S. C., Sup. II, Title 42, Sec. 405)	19–20
Sec. 206 (U. S. C., Sup. II, Title 42, Sec. 406)	19
Sec. 207 (U. S. C., Sup. II, Title 42, Sec. 407)	19
Sec. 208 (U. S. C., Sup. II, Title 42, Sec. 408)	19–20
Sec. 209 (U. S. C., Sup. II, Title 42, Sec. 409)	20
Sec. 210 (U. S. C., Sup. II, Title 42, Sec. 411)	20–21
Sec. 801 (U. S. C., Sup. II, Title 42, Sec. 1001)	7
Sec. 802 (U. S. C., Sup. II, Title 42, Sec. 1002)	8
Sec. 803 (U. S. C., Sup. II, Title 42, Sec. 1003)	8
Sec. 804 (U. S. C., Sup. II, Title 42, Sec. 1004)	8–9
Sec. 805 (U. S. C., Sup. II, Title 42, Sec. 1005)	9
Sec. 806 (U. S. C., Sup. II, Title 42, Sec. 1006)	9–10
Sec. 807 (U. S. C., Sup. II, Title 42, Sec. 1007)	10–11
Sec. 808 (U. S. C., Sup. II, Title 42, Sec. 1008)	11
Sec. 809 (U. S. C., Sup. II, Title 42, Sec. 1009)	11–12
Sec. 810 (U. S. C., Sup. II, Title 42, Sec. 1010)	12–13
Sec. 811 (U. S. C., Sup. II, Title 42, Sec. 1011)	13
Miscellaneous:	
Regulations 91:	
Art. 401	5
Art. 410	5

139219—37——1

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GEORGE P. DAVIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue and the Collector of Internal Revenue for the District of Massachusetts, prays that a writ of certiorari issue to review the ~~case on April 14, 1937, reversing the~~ judgment of the Circuit Court of Appeals for the First Circuit entered in the above case on April 16, 1937, reversing the judgment of the District Court for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court (R. 19–22) is reported in 18 F. Supp. 1. The opinion of the Circuit Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 14, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the tax imposed upon employers by Section 804 of the Social Security Act is within the power of Congress under the Constitution.

2. Whether the validity of the tax imposed upon employees by Section 801 of the Social Security Act is properly in issue in this case, and if it is, whether that tax is within the power of Congress under the Constitution.

STATUTE INVOLVED

Titles VIII and II of the Social Security Act appear in the Appendix, *infra,* pp. 7–21.

STATEMENT

On November 17, 1936, the respondent, George P. Davis, a stockholder in The Edison Electric Illuminating Company of Boston, filed a bill in equity against his corporation in the United States District Court for the District of Massachusetts.

He alleged that the taxes imposed by Section 801 (collection of which is provided for in Section 802) and Section 804 of the Social Security Act are unconstitutional; that he had so advised the defendant corporation; that the corporation nevertheless proposed to make the payments required by those Sections; and that further appeals to the defendant or its officers would be useless. And after an allegation of threat of irreparable injury, he prayed that the corporation be enjoined from making the aforesaid payments and that "Sections 802 and 804 be held to be not an Act of the Congress within its powers under the Constitution of the United States * * *" (R. 2–5).

The defendant corporation filed its answer on November 25, 1936 (R. 6–7).

Thereupon, the United States Commissioner of Internal Revenue and the United States Collector of Internal Revenue for the District of Massachusetts, the petitioners herein, sought, and on November 30, 1936, were permitted to intervene as defendants (R. 9–12). Once admitted, the intervening defendants filed two pleadings. The first was a motion to strike so much of the bill as related to the tax upon employees (Section 801) on the ground that the defendant employer, not being subject to tax under those provisions does not have any standing to challenge the validity of that tax, and that the plaintiff stockholder whose rights are no greater than those of his corporation has even less

standing to assail its validity (R. 12). The second was an answer which (1) restated the point raised in the motion to strike, (2) denied that the taxes imposed by Title VIII are unconstitutional, and (3) averred that the bill sets forth no facts which, if true, would entitle the plaintiff to the relief prayed for (R. 13–18).

The District Court concluded that the tax upon employees was not properly in issue and that the tax upon employers was constitutional. It thereupon denied the prayer for an injunction and dismissed the bill (R. 22). The Circuit Court of Appeals reversed, Judge Bingham dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the tax imposed upon employees by Section 801 is in issue in this case.

2. In holding that the tax imposed upon employees by Section 801 is invalid.

3. In holding that the tax imposed upon employers by Section 804 is invalid.

4. In reversing the judgment of the District Court.

REASON FOR GRANTING THE WRIT[1]

The question presented is of great fiscal importance to the Treasury of the United States. The taxes held by the lower court to be unconstitu-

[1] The validity of the taxes imposed by Section 901 of the Social Security Act is now before this Court in *Chas. C. Steward Machine Co.* v. *Davis*, No. 837.

tional are payable monthly (see Regulations 91, Articles 401, 410). This revenue is paid into the general treasury as internal revenue collections at the rate of over $40,000,000 a month. The existence of the lower court decision is likely to result in a multiplicity of suits harassing the Government in its effort to enforce the statute. Further, if collections continue and the taxes be declared invalid, the administrative burden of making refunds would be staggering.

The issues involved are of great public importance because the taxes imposed by Sections 801 and 804 and held to be unconstitutional below are being collected from more than 26,000,000 employees and 2,700,000 employers.

The Government has already expended upwards of 10 million dollars and it is expected that at least 5 million dollars more will be expended before the end of this fiscal year to perfect the appropriate administrative machinery to deal with these taxes and to accomplish the purposes of the Act. Upwards of 26 million persons have registered for prospective benefits. A prompt decision is therefore of the highest importance.

The Circuit Court of Appeals for the Second Circuit in *Norman* v. *Consolidated Edison Co. of New York,* decided April 12, 1937, where the point was urged by the Government as well as by the defendant corporation, held that the stockholder's action is not an appropriate one for the determina-

tion of the constitutionality of this statute. The contention, however, with respect to the tax upon employers was not made below in this case, and as was done in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 469, 554, it is waived here so far as it is in the power of Government officers so to do.

In view of the pressing importance of this case, petitioners respectfully request, if the petition is granted, that the Court set the case for argument in the second week of the coming session of this term of Court.

The Edison Electric Illuminating Co. of Boston and George P. Davis, the other parties in this case, have, through their counsel, authorized the Solicitor General to state that they do not oppose the granting of the writ, or the setting of an early date for argument in this case.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL 1937.

APPENDIX

SOCIAL SECURITY ACT OF AUGUST 14, 1935, C. 531, 49 STAT. 620

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

INCOME TAX ON EMPLOYEES

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum. (U. S. C., Sup. II, Title 42, Sec. 1001.)

139218—37——2

DEDUCTION OF TAX FROM WAGES

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 801 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer. (U. S. C., Sup. II, Title 42, Sec. 1002.)

DEDUCTIBILITY FROM INCOME TAX

SEC. 803. For the purposes of the income tax imposed by Title I of the Revenue Act of 1934 or by any Act of Congress in substitution therefor, the tax imposed by section 801 shall not be allowed as a deduction to the taxpayer in computing his net income for the year in which such tax is deducted from his wages. (U. S. C., Sup. II, Title 42, Sec. 1003.)

EXCISE TAX ON EMPLOYERS

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936,

with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum. (U. S. C., Supp. II, Title 42, Sec. 1004.)

ADJUSTMENT OF EMPLOYER'S TAX

SEC. 805. If more or less than the correct amount of tax imposed by section 804 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments with respect to the tax shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer. (U. S. C., Sup. II, Title 42, Sec. 1005.)

REFUNDS AND DEFICIENCIES

SEC. 806. If more or less than the correct amount of tax imposed by section 801 or 804 is paid or deducted with respect to any wage payment and the overpayment or underpayment of tax cannot be adjusted under section 802 (b) or 805 the amount of the overpayment shall be refunded and the

amount of the underpayment shall be collected, in such manner and at such times (subject to the statutes of limitations properly applicable thereto) as may be prescribed by regulations made under this title. (U. S. C., Sup. II, Title 42, Sec. 1006.)

COLLECTION AND PAYMENT OF TAXES

SEC. 807. (a) The taxes imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. If the tax is not paid when due, there shall be added as part of the tax interest (except in the case of adjustments made in accordance with the provisions of sections 802 (b) and 805) at the rate of one-half of 1 per centum per month from the date the tax became due until paid.

(b) Such taxes shall be collected and paid in such manner, at such times, and under such conditions, not inconsistent with this title (either by making and filing returns, or by stamps, coupons, tickets, books, or other reasonable devices or methods necessary or helpful in securing a complete and proper collection and payment of the tax or in securing proper identification of the taxpayer), as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable with respect to the taxes imposed by this title.

(d) In the payment of any tax under this title a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent. (U. S. C., Sup. II, Title 42, Sec. 1007.)

RULES AND REGULATIONS

SEC. 808. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title. (U. S. C., Sup. II, Title 42, Sec. 1008.)

SALE OF STAMPS BY POSTMASTERS

SEC. 809. The Commissioner of Internal Revenue shall furnish to the Postmaster General without prepayment a suitable quantity of stamps, coupons, tickets, books, or other devices prescribed by the Commissioner under section 807 for the collection or payment of any tax imposed by this title, to be distributed to, and kept on sale by, all post offices of the first and second classes, and such post offices of the third and fourth classes as (1) are located in county seats, or (2) are certified by the Secretary of the Treasury to the Postmaster General as necessary to the proper administration of this title. The Postmaster General may require each such postmaster to furnish bond in such increased amount as he may from time to time determine, and each such postmaster shall deposit the receipts from the sale of such stamps, coupons, tickets, books, or other devices, to the credit of, and render accounts to, the Postmaster General at such times and in such form as the Postmaster General may

by regulations prescribe. The Postmaster General shall at least once a month transfer to the Treasury as internal-revenue collections all receipts so deposited together with a statement of the additional expenditures in the District of Columbia and elsewhere incurred by the Post Office Department in performing the duties imposed upon said Department by this Act, and the Secretary of the Treasury is hereby authorized and directed to advance from time to time to the credit of the Post Office Department from appropriations made for the collection of the taxes imposed by this title, such sums as may be required for such additional expenditures incurred by the Post Office Department. (U. S. C., Sup. II, Title 42, Sec. 1009.)

PENALTIES

SEC. 810. (a) Whoever buys, sells, offers for sale, uses, transfers, takes or gives in exchange, or pledges or gives in pledge, except as authorized in this title or in regulations made pursuant thereto, any stamp, coupon, ticket, book, or other device, prescribed by the Commissioner of Internal Revenue under section 807 for the collection or payment of any tax imposed by this title, shall be fined not more than $1,000 or imprisoned for not more than six months, or both.

(b) Whoever, with intent to defraud, alters, forges, makes, or counterfeits any stamp, coupon, ticket, book, or other device prescribed by the Commissioner of Internal Revenue under section 807 for the collection or payment of any tax imposed by this title, or uses, sells, lends, or has in his possession any such altered, forged, or counterfeited

stamp, coupon, ticket, book, or other device, or makes, uses, sells, or has in his possession any material in imitation of the material used in the manufacture of such stamp, coupon, ticket, book, or other device, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (U. S. C., Sup. II, Title 42, Sec. 1010.)

DEFINITIONS

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed by an individual who has attained the age of sixty-five;

(5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. (U. S. C., Sup. II, Title 42, Sec. 1011.)

TITLE II—FEDERAL OLD-AGE BENEFITS

OLD-AGE RESERVE ACCOUNT

SECTION 201. (a) There is hereby created an account in the Treasury of the United States to be known as the "Old-Age Reserve Account" hereinafter in this title called the "Account." There is hereby authorized to be appropriated to the Account for each fiscal year, beginning with the fiscal year ending June 30, 1937, an amount sufficient as an annual premium to provide for the payments required under this title, such amount to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually. The Secretary of the Treasury shall submit annually to the Bureau of the Budget an estimate of the appropriations to be made to the Account.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the amounts credited to the Account as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Account. Such special obligations shall bear interest at the rate of 3 per centum per annum. Obligations other than such special obligations may be acquired for the Account only on such terms as to provide an investment yield of not less than 3 per centum per annum.

(c) Any obligations acquired by the Account (except special obligations issued exclusively to the Account) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Account shall be credited to and form a part of the Account.

(e) All amounts credited to the Account shall be available for making payments required under this title.

(f) The Secretary of the Treasury shall include in his annual report the actuarial status of the Account. (U. S. C., Sup. II, Title 42, Sec. 401.)

OLD-AGE BENEFIT PAYMENTS.

SEC. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than $3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than $3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of $3,000; plus

(B) One-twelfth of 1 per centum of the amount by which such total wages exceeded $3,000 and did not exceed $45,000; plus.

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded $45,000.

(b) In no case shall the monthly rate computed under subsection (a) exceed $85.

(c) If the Board finds at any time that more or less than the correct amount has theretofore been paid to any individual under this section, then, under regulations made by the Board, proper ad-

justments shall be made in connection with subsequent payments under this section to the same individual.

(d) Whenever the Board finds that any qualified individual has received wages with respect to regular employment after he attained the age of sixty-five, the old-age benefit payable to such individual shall be reduced, for each calendar month in any part of which such regular employment occurred, by an amount equal to one month's benefit. Such reduction shall be made, under regulations prescribed by the Board, by deductions from one or more payments of old-age benefit to such individual. (U. S. C., Sup. II, Title 42, Sec. 402.)

PAYMENTS UPON DEATH

SEC. 203. (a) If any individual dies before attaining the age of sixty-five, there shall be paid to his estate an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936.

(b) If the Board finds that the correct amount of the old-age benefit payable to a qualified individual during his life under section 202 was less than 3½ per centum of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which such 3½ per centum exceeds the amount (whether more or less than the correct amount) paid to him during his life as old-age benefit.

(c) If the Board finds that the total amount paid to a qualified individual under an old-age benefit

during his life was less than the correct amount to which he was entitled under section 202, and that the correct amount of such old-age benefit was 3½ per centum or more of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which the correct amount of the old-age benefit exceeds the amount which was so paid to him during his life. (U. S. C., Sup. II, Title 42, Sec. 403.)

PAYMENTS TO AGED INDIVIDUALS NOT QUALIFIED FOR BENEFITS.

SEC. 204. (a) There shall be paid in a lump sum to any individual who, upon attaining the age of sixty-five, is not a qualified individual, an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five.

(b) After any individual becomes entitled to any payment under subsection (a), no other payment shall be made under this title in any manner measured by wages paid to him, except that any part of any payment under subsection (a) which is not paid to him before his death shall be paid to his estate. (U. S. C., Sup. II, Title 42, Sec. 404.)

AMOUNTS OF $500 OR LESS PAYABLE TO ESTATES

SEC. 205. If any amount payable to an estate under section 203 or 204 is $500 or less, such amount may, under regulations prescribed by the Board, be paid to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity

of compliance with the requirements of law with respect to the administration of such estate. (U. S. C., Sup. II, Title 42, Sec. 405.)

OVERPAYMENTS DURING LIFE

SEC. 206. If the Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was more than the correct amount to which he was entitled under section 202, and was 3½ per centum or more of the total wages by which such old-age benefit was measurable, then upon his death there shall be repaid to the United States by his estate the amount, if any, by which such total amount paid to him during his life exceeds whichever of the following is the greater: (1) Such 3½ per centum, or (2) the correct amount to which he was entitled under section 202. (U. S. C., Sup. II, Title 42, Sec. 406.)

METHOD OF MAKING PAYMENTS

SEC. 207. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each person entitled to receive a payment under this title, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursement of the Treasury Department, and prior to audit or settlement by the General Accounting Office, shall make payment in accordance with the certification by the Board. (U. S. C., Sup. II, Title 42, Sec. 407.)

ASSIGNMENT

SEC. 208. The right of any person to any future payment under this title shall not be transferable

or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. (U. S. C., Sup. II, Title 42, Sec. 408.)

PENALTIES

SEC. 209. Whoever in any application for any payment under this title makes any false statement as to any material fact, knowing such statement to be false, shall be fined not more than $1,000 or imprisoned for not more than one year, or both. (U. S. C., Sup. II, Title 42, Sec. 409.)

DEFINITIONS

SEC. 210. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(c) The term "qualified individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than $2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year. (U. S. C., Sup. II, Title 42, Sec. 410.)

U. S. GOVERNMENT PRINTING OFFICE: 1937